

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

**MICHAEL L. KIRBY V. HOWARD CARLTON, WARDEN**

**Appeal from the Circuit Court for Johnson County  
No. 5075    Lynn W. Brown, Judge**

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**No. E2007-01249-CCA-R3-HC - Filed October 2, 2008**

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The pro se petitioner, Michael L. Kirby, appeals from the trial court's order denying his petition for writ of habeas corpus. The state has filed a motion requesting that this court affirm the order pursuant to Rule 20 of the Rules of the Court of Criminal Appeals. The petition fails to establish a cognizable claim for habeas corpus relief. Accordingly, the state's motion is granted and the judgment of the trial court is affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed  
Pursuant to Rule 20, Rules of the Court of Criminal Appeals**

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which NORMA MCGEE OGLE and D. KELLY THOMAS, JR., JJ., joined.

Michael L. Kirby, Mountain City, Tennessee, Pro Se.

Robert E. Cooper, Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General, for the appellee, State of Tennessee.

**MEMORANDUM OPINION**

The record reflects that in August 2000, the petitioner was convicted pursuant to his guilty plea for possession of less than .5 grams of cocaine for resale, a class C felony. See T.C.A. 39-17-417(c)(2)(A). The petitioner was sentenced to 5 years as a standard offender with the sentence ordered to be served consecutively to the sentence imposed in another case. No direct appeal was taken.

On April 25, 2007, the petitioner filed a petition for writ of habeas corpus in which he challenged the five year sentence. He asserted that the trial court enhanced his sentence in violation of his Sixth Amendment right to jury trial as interpreted by the United States Supreme Court in Cunningham v. California, 549 U.S. 270, 127 S. Ct. 856 (2007). On May 24, 2007, the trial court found that the habeas corpus petition failed to present a cognizable claim and denied relief. The instant appeal followed.

In Tennessee, the grounds upon which habeas corpus relief may be granted are very narrow. Taylor v. State, 995 S.W.2d 78, 83 (Tenn. 1999). The writ will issue only when the petitioner has established lack of jurisdiction for the order of confinement or that he is otherwise entitled to immediate release because of the expiration of his sentence. See Ussery v. Avery, 222 Tenn. 50, 432 S.W.2d 656 (1968); State ex rel. Wade v. Norvell, 1 Tenn. Crim. App. 447, 443 S.W.2d 839 (1969). The purpose of the habeas corpus petition is to contest a void, not merely a voidable, judgment. State ex rel Newsome v. Henderson, 424 S.W.2d 186, 189 (1969). A void, as opposed to a voidable, judgment is "one that is facially invalid because the court did not have the statutory authority to render such judgment." See Summers v. State, 212 S.W.3d 251, 256 (Tenn. 2007). A petitioner bears the burden of establishing a void judgment or illegal confinement by a preponderance of the evidence. See Wyatt v. State, 24 S.W.3d 319, 322 (Tenn. 2000). A court may summarily dismiss a petition for habeas corpus relief, without the appointment of counsel and without an evidentiary hearing, if the petition does not state a cognizable claim. See Hickman v. State, 153 S.W.3d 16, 20 (Tenn. 2004).

In Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 2536 (2004), the Supreme Court held that any fact other than that of a prior conviction used to enhance a defendant's sentence must be proven to a jury beyond a reasonable doubt. In Cunningham v. California, 549 U.S. 270, 127 S. Ct. 856 (2007), the Court extended Blakely to strike down a state's sentencing structure that permitted enhanced sentencing based on judicially found facts. Initially, the petitioner's claim of an erroneously enhanced sentence is not cognizable in a habeas corpus case because the claim, even if proven, would render the judgment voidable, not void. Additionally, this Court has repeatedly held that Blakely v. Washington and its progeny, including Cunningham, did not create a new rule of law entitled to retroactive application in the context of a collateral, habeas corpus proceeding. See e.g., Gary Wallace v. State, No. W2007-01949-CCA-R3-CO, 2008 Tenn. Crim. App. LEXIS 514, at \*5 (Tenn. Crim. App., Jackson, Jul. 2, 2008); Glen Cook v. State, No. W2006-01514-CCA-R3-PC, 2008 WL 821532, at \*10 (Tenn. Crim. App., Jackson, Mar. 27, 2008); Billy Merle Meeks v. Ricky J. Bell, Warden, No. M2005-00626-CCA-R3-HC, 2008 Tenn. LEXIS 215, 2007 WL 4116486, at \*7-8 (Tenn. Crim. App., Nashville, Apr. 7, 2008). The petitioner has stated neither a claim of a void judgment, that is, one that the trial court was without authority to enter, nor one of an expired sentence. The trial court properly dismissed the petition.

Upon due consideration of the pleadings, the record, and the applicable law, the court concludes that the petitioner has not established that he is entitled to habeas corpus relief. Accordingly, the state's motion is granted. The judgment of the trial court is affirmed in accordance with Rule 20, Rules of the Court of Criminal Appeals.

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PRESIDING JUDGE JOSEPH M. TIPTON